NO. 89-974

In the Supreme Court of the United States

October Term, 1989

PETROLEO BRASILEIRO, S.A.,
Petitioner,

vs.

ATWOOD TURNKEY DRILLING, INC.
AND ATWOOD DO BRASIL SERVICOS DE
ASSISTENCIA MARITIMA, LTDA.,
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIMA LTDA. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit correctly determined that the Foreign Sovereign Immunities Act did not bar the injunction entered by the District Court?
2. Whether the Court of Appeals for the Fifth Circuit correctly determined that, even if the order issued by the District Court was an attachment, the Petitioner contractually waived its right to sovereign immunity as is permissible under 28 U.S.C. 1610?
3. Whether this appeal is completely meritless since subsequent to filing the appeal in the Fifth Circuit Court of Appeals, the District Court struck the Petitioner's defenses under 28 U.S.C. 1602 et seq. due to its misconduct in discovery?
4. Whether the Court of Appeals for the Fifth Circuit had jurisdiction over this interlocutory appeal, and consequently, whether this Court has jurisdiction over this interlocutory appeal, since Petitioner claims the order in question is an attachment, and only the granting of an injunction, not an attachment, is subject to an interlocutory appeal under to 28 U.S.C. 1292?

PARTIES TO THE PROCEEDING

1. Atwood Turnkey Drilling, Inc. - Plaintiff, Appellee and Respondent

   Atwood do Brasil Servicos de Assistencia Maritima, Ltd - Plaintiff, Appellee and Respondent (hereinafter referred to jointly as "ATDI" or "Respondent")

2. Petroleo Brasileira, S.A. - Defendant, Appellant and Petitioner * (hereinafter referred to as "Petrobras" or "Petitioner")

   Internor Trade Inc. - Defendant Appellant **

3. International Underwater Contractors, Inc. - Defendant **

* Respondent has no means of informing the Court of all of the affiliated companies of Petroleo Brasileiro as is mandated by Rule 28.1. Nevertheless, discovery in this case has revealed that not all of its subsidiaries are wholly owned by Petrobras and if the Court in this case wishes further information it will need to direct any inquiry to the Petitioner.

** Although both Internor Trade, Inc. and International Underwater Contractors are parties to the ongoing litigation, neither has taken an active role in this appeal.

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Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

This is an interlocutory appeal from the issuance of an injunction by the United States District Court for the Southern District of Texas (no reported decision) which was affirmed by the Court of Appeals for

the Fifth Circuit in an opinion published at 875 F.2d 1174 (5th Cir. 1989). The Court of Appeals made minor changes in wording on rehearing in an unpublished opinion.

REPLY TO STATEMENT OF JURISDICTION

If the Petitioner's statements to the effect that the District Court's order is an order of attachment (such statements being the entire crux of Petrobras' Petition) are taken as being accurate, then this Court does not have jurisdiction under 28 U.S.C. 1254(1) as alleged because interlocutory orders granting attachments are not appealable. (See point IV on page 24, infra.) To the contrary if this Court believes, as did the District Court and the Court of Appeals for the Fifth Circuit, that the order in question is an injunction, then this Court has jurisdiction under 28 U.S.C. 1254(1), but in so finding this Court by necessity must find that Petitioner's argument on appeal is meritless because 28 U.S.C. 1609 does not prohibit injunctions.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. 1254(1), 28 U.S.C. 1291, 28 U.S.C. 1292(1), 28 U.S.C. 1609, and 28 U.S.C. 1610.

1. U.S.C. 1254.(1)

> § 1254. Courts of appeals; certiorari; appeal; certified questions.
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. 28 U.S.C. 1291 (in pertinent part):

> § 1291 Final decisions of district courts
>
> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . . (Emphasis added).

3. 28 U.S.C. 1292(a)(1):

> § 1292. Interlocutory decisions
> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

(Emphasis added).

4. 28 U.S.C. 1609:

§1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter. (Emphasis added.)

5. 28 U.S.C. 1610(d) (in pertinent part):

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver,

STATEMENT OF THE CASE

A. Statement of Facts.

Petrobras contracted with ATDI to have ATDI drill seventeen oil wells for it. Petrobras breached this contract after ATDI drilled six producing wells because of the falling price of oil. ATDI was never paid for all the oil wells it drilled, nor was ATDI compensated for the money it lost by the refusal of Petrobras to allow it to complete the entire project. Petrobras admitted (and, in fact, has judicially admitted in the District Court in this case) that it owes ATDI millions of dollars, but has taken the position that it will not pay ATDI anything unless ATDI releases all of its other damages claims.

The contract between ATDI and Petrobras was based totally upon the ability of Petrobras to get financing from the Export-Import Bank (hereinafter "Exim"). This financing is available to certain foreign entities if they hire American contractors to do portions of the work. Since ATDI was a United States company, this Exim financing requirement was met. Petrobras used the Exim guarantee to establish a Credit Agreement and a Letter of Credit with First Interstate Bank of California. The

Credit Agreement provides for letters of credit to be used by Petrobras to pay for United States suppliers of services, equipment, and material of United States origin, approved by Eximbank and used in drilling in the Campos Basin. ATDI is, and Petrobras has not claimed otherwise, one of those suppliers. The origination language in the Credit Agreement states:

> [t]he Borrower (Petrobras) may utilize the Bank Credit and the Eximbank credit in the following two ways:
>
> (1) [omitted]
>
> (2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank . . . in favor of U.S. Suppliers of the Items. ["Items" being defined on p. 1 of the Credit Agreement as services, equipment, and materials of United States origin as are approved by Eximbank required for drilling services in the Campos Basin.] (Credit Agreement Article V, p. 19.) (See Appendix A).

Petrobras chose the second route, and pursuant to Article V of the Credit Agreement Petrobras established the letter of credit to pay ATDI. Article IX of the Credit Agreement that provided for the establishment of the letter of credit in favor of ATDI, states, in its pertinent part:

> *Waiver of Sovereign Immunity.* The Borrower [Petrobras] acknowledges and agrees that the activities contemplated by the provisions of this Agreement [i.e. including the provisions that provide for letters of credit] and the notes are commercial in nature rather than governmental or public and therefore acknowledge and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. (Credit Agreement Article IX, p. 26; emphasis added). (See Appendix A.)

The purpose of the Credit Agreement was to provide for and ensure payments to United States suppliers of goods and services for drilling activities in the Campos Basin. The only reason the Credit Agreement existed was because ATDI as an American supplier enabled Petrobras to obtain Eximbank financing. The Letter of Credit established pursuant to the Credit Agreement was specifically established to pay the sums owed ATDI. ATDI, as the beneficiary of the Letter of Credit, was to be paid on draws from the Letter of Credit. After Petrobras breached the contract, ATDI attempted to draw on the Letter of Credit for the sums it was owed, but the bank, acting on the orders of Petrobras, refused to pay.

In the meantime Petrobras attempted to cancel the Letter of Credit and, in effect, used all means at its disposal to insure that ATDI would not be paid, despite the fact that ATDI was indisputably owed millions of dollars.

B. Course Of Proceedings In The Courts Below.

Once it became clear that Petrobras would not voluntarily pay ATDI the money it owed, ATDI filed this action against Petrobras in the 165th Judicial District Court of Harris County, Texas. Petrobras responded to this lawsuit by removing the case to the United States District Court for the Southern District of Texas under the removal provision of §1330(a) and the Foreign Sovereign Immunities Act. 28 U.S.C. 1602 et seq. (hereinafter "FSIA"). It should be noted that since answering Petrobras has waived its contention that the Court does not have jurisdiction under the FSIA to hear this case. (See Appendix B.)

Due to the clear and convincing evidence that ATDI presented in favor of its motion, United States District Judge David Hittner granted a temporary restraining order and ordered Petrobras to extend the Letter of Credit. The Court also ordered ATDI to put up a

bond for $20,000, well in excess of any costs involved. ATDI immediately put up the bond. United States Magistrate Karen Brown held a hearing on a temporary injunction at which ATDI presented evidence exactly comporting with this Court's and the Fifth Circuit's requirements governing temporary injunctions. Judge Brown recommended a preliminary injunction be granted. United States District Court Judge John Singleton adopted her recommendation and entered the order in question.

This injunction was appealed to the United States Court of Appeals for the Fifth Circuit. That Court heard oral argument and affirmed the issuance of the temporary injunction. Petrobras has now filed a Petition for a Writ of Certiorari with this Court. Its only complaint before this Court is that the injunction is prohibited by 28 U.S.C. 1609. The Petition is without merit and should be denied.

During the course of the case and in response to the various defenses raised by Petrobras' answer (including those concerning the FSIA), ATDI sent interrogatories and requests for production to Petrobras

which inquired about the facts underlying these alleged defenses. Petrobras refused to answer these discovery requests. ATDI filed a Motion to Compel. Petrobras did not even reply to the Motion to Compel. At the time of the hearing on this injunction, they still had not answered the discovery. The District Court on several occasions ordered Petrobras to produce this discovery and Petrobras did not comply with these orders. Due to Petrobras' refusal to comply with discovery rules and obey court orders, the District Court granted a motion for sanctions pursuant to Fed. R. Civ. P. 37. One of the sanctions imposed was the striking of its defenses under the FSIA. (See Appendix B.)

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Foreign Sovereign Immunities Act Does Not Prohibit A Court From Entering An Injunction.

Initially, ATDI should state that Petrobras announced in open court, that it was conceding the jurisdictional question it had originally raised under the FSIA. Therefore, the question before this Court is not

jurisdiction under the FSIA, but whether the Fifth Circuit incorrectly affirmed an injunction keeping intact the Letter of Credit which underlies the contract in this case.

The FSIA was passed to protect American businesses that are doing business with foreign entities. It was not, as implied by Petrobras, passed solely to protect instrumentalities of foreign states. The express purpose of the Act was to restrict the immunity of foreign states in their public acts. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

A. Injunctions Are Not Prohibited By The Foreign Sovereign Immunities Act

The FSIA, 28 U.S.C. 1609, expressly limits the powers of a court to issue an order of "attachment arrest and execution." The order complained of by Petrobras is an injunction which does not attach, arrest or execute. Petrobras' claim that the Court cannot enter an injunction is unsupportable. As authority, Petrobras puts forth *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983). This case deals with a different fact situation. (Initially, it is an appeal from an order vacating a

prejudgment attachment. An order granting an attachment is not appealable interlocutorily.) Further, in *S&S* the American company actually seized the defendant's property including bank accounts and other assets worth over a million dollars. No Petrobras property was taken or can be taken under this order. In *S&S* the parties admitted the order in question was in reality an attachment. However, ATDI does not admit that this order is an attachment; and, indeed it is not. Finally, the order in *S&S* was against the foreign entity negotiating a letter of credit of which it was the beneficiary. The letters of credit in *S&S* were issued to the Romanian Bank. In the instant case, they were issued to ATDI. Since Petrobras is not the beneficiary of the Letter of Credit, none of its assets are affected.

Under Petrobras' theory of law, the District Court has no power to enjoin any kind of activity that a foreign entity may want to do; no matter how egregious, no matter how hideous. That was not the intent of Congress. If it were, it would have specifically stated that injunctions were also barred by the Act, instead of limiting 28 U.S.C. 1609 to attachments, arrests and executions. According to

Petrobras' theory, it can convert assets of ATDI or commit other untoward acts and no court in this nation can stop it. This reasoning is unfathomable, but it is the logical result of what Petrobras is arguing.

The courts which have faced this question have uniformly held that an injunction is not prohibited by the FSIA. In *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982), the Court dealt with a similar Letter of Credit situation. It first noted that the radio company, the instrumentality of the foreign state, was the beneficiary of the Letter of Credit (unlike Petrobras). Despite the fact that it was the beneficiary (and therefore the one who owned the Letter of Credit), the Court held that an injunction against payment was appropriate. In that case, unlike this one, the Court actually deprived the foreign state entity of the use of one of its assets; and in doing so held an injunction was appropriate under the FSIA. In *Sperry Intern. Trade, Inc. v. Government of Israel*, 689 F.2d 301 (2d Cir. 1981), the Second Circuit upheld an injunction prohibiting Israel from obtaining the proceeds of a Letter of Credit. *See also, Wylie v. Bank Melli of Tehran, Iran*, 577 F.Supp. 1148

(N.D. Cal. 1983) wherein an injunction was upheld. In *Wylie* the court especially noted the American company, like ATDI, had strong equities in its favor because it was a trustee for its creditors. The court also noted that the foreign entity, like Petrobras, would suffer no loss by the entry of the injunction.

The order in this case was an injunction. It is permitted by the FSIA and Petrobras has cited no applicable authority otherwise. The Court's order does not take any property of Petrobras. It does not attach anything. At most, it preserved ATDI's Letter of Credit pending judgment. Finally, any alleged cost to Petrobras is bonded by ATDI. This Petition is meritless and should be denied.

B. No Property Of Petrobras Is Subject To "Attachment, Arrest and Execution."

What the courts below noted, and what this Court should note is that no assets of Petrobras have been taken or seized or could be taken or seized under the order. Nor has Petrobras been restricted in the use of its assets in any manner. Petrobras admitted in its brief before the Fifth Circuit that the order "did not physically tie up the

funds of Petrobras . . . ." (Appellant's Brief, p. 14). Nor has Petrobras ever complained that ATDI could under any circumstances use the order in question to attach any property. Even if an argument could be made that a letter of credit, which is the document the injunction order addresses, could be attached, it would still have to be Petrobras' property for 28 U.S.C. 1609 to apply. This is not the case. The Letter of Credit and Exim financing were integral parts of the contract. The Exim financing paid for (or at least guaranteed) the Letter of Credit. The Letter of Credit was then issued by the bank for the benefit of ATDI. It was for ATDI's benefit, not Petrobras'. For Petrobras to even have an argument, it would have to be the beneficiary of the Letter of Credit.

Assuming *arguendo* that the order is an attachment, it would be controlled by Rule 64, Federal Rules of Civil Procedure. Rule 64 dictates "all remedies providing for seizure of person or property . . . are available under the circumstances and in the manner provided by the law of the state in which the district court is held." In Texas, as well as most other jurisdictions, letters of credit are considered contracts between the issuer and the

beneficiary. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984). This principle has been recognized by federal appellate courts, as well as in state courts. For example, in *Bank of Newport v. First Nat'l Bank & Trust Co.*, 687 F.2d 1257 (8th Cir. 1982) the court held that it is a cardinal principal of law that the obligation of the issuer of a Letter of Credit (the bank) to pay a beneficiary (ATDI) is independent from the relationship between the customer (Petrobras) and the beneficiary (ATDI). In the instant case, the issuer is First Interstate Bank of California and the beneficiary is ATDI. (Vol. 1, pp. 71-73). The letter of credit belongs to ATDI. Consequently no property of Petrobras is affected, even if the Court's order is an attachment.

The order in question is clearly an injunction. Injunctions are not prohibited by 28 U.S.C. 1609. It does not attach, arrest or execute upon any property of Petrobras. All the order does is maintain the status quo pending the determination of the issues in this case. The Petition is meritless and should be denied.

II.

ASSUMING ARGUENDO THAT THE ORDER COMPLAINED OF IS AN ATTACHMENT, IT IS NOT PROHIBITED BY THE APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT BECAUSE PETROBRAS WAIVED ITS IMMUNITY.

The Fifth Circuit correctly noted that Petrobras waived any immunity it might have by its contractual dealings in this case pursuant to 28 U.S.C. 1610(d). The key to Petrobras and ATDI doing business was whether ATDI could help Petrobras obtain Eximbank financing. Once ATDI enabled Petrobras to qualify for Eximbank financing, the parties involved entered into the Credit Agreement. The Credit Agreement, itself, provides for letters of credit to be used by Petrobras to pay United States suppliers of services, equipment and material of United States origin, approved by Eximbank and used in drilling the Campos Basin. ATDI, is and Petrobras has not claimed otherwise, one of those very suppliers. The origination language in the Credit Agreement states:

> [t]he Borrower [Petrobras] may utilize the Bank Credit and the Eximbank credit in the following two ways:
>
> (1) [omitted]
>
> (2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank . . . in favor of U.S. Suppliers of the Items. ["Items" being defined on p. 1 of the Credit Agreement as services, equipment, and materials of United States origin as are approved by Eximbank required for drilling services in the Campos Basin.] (Credit Agreement Article V.)

Petrobras chose the second route, and pursuant to Article V of the Credit Agreement established the letter of credit to pay ATDI. This was done under the terms of the Credit Agreement Article V. Petrobras cannot claim with any credibility the Credit Agreement does not relate to the letter of credit. Petrobras in its Petition to this Court admits that it " . . . waived all its sovereign rights in any legal action arising out of or relating to . . . " the Credit Agreement. (Petrobras Petiton p. 6). The Fifth Circuit correctly found that the entire purpose of the Credit Agreement was to ensure that American suppliers would be paid and the letter of credit was one of the two available

means for Petrobras to do it. There is no doubt the Letter of Credit related to the Credit Agreement.

The waiver of sovereign immunity in the Credit Agreement is not limited to certain provisions of the Credit Agreement as Petrobras claims. By its very language it extends to all of the provisions of the Credit Agreement and all activities "related to" or "contemplated by" by the Credit Agreement. This includes, by virtue of Article V, the letter of credit in favor of ATDI. The waiver states in pertinent part:

> *Waiver of Sovereign Immunity.* The Borrower acknowledges and agrees that the activities contemplated by the provisions of this Agreement [i.e. including the provisions that provide for letters of credit] and the notes are commercial in nature rather than governmental or public and therefore acknowledge and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. (Credit Agreement, Article IX., p. 26 emphasis added).

The letter of credit in favor of ATDI created by the provisions of the Credit Agreement is certainly an

activity "contemplated by the provisions of this Agreement." To reach the conclusion that Petrobras wants, this Court would have to ignore the clear language in Article V. The legal action extending ATDI's letter of credit is unquestionably a "legal action or proceeding arising out of or relating to this Agreement" because the Letter of Credit arises out of and relates to the Credit Agreement. Furthermore, the immunity applies to "all activities . . . arising out of or relating to this agreement. . . ." The drilling in the Campos Basin is just such an activity. It is not only related to the agreement, it is the entire reason for the agreement.

Petitioner's own authority does not support its claim. In *Schwartz v. Merchants Bank of New York*, 490 N.Y.S.2d 194 (1st Dep't. 1985) no claim was ever made that the foreign sovereign expressly waived its immunity. The citation of *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47 (2nd Cir. 1982), is even more perplexing. That opinion supports the Fifth Circuit decision in this case. In *Libra* the Court held the attachment to be proper even though the words "prejudgment attachment" were

not specifically used in the waiver provision. One need only compare the *Libra* waiver provision with the one in this case to see how much broader the waiver language is in the instant case. If the attachment was appropriate in Libra; it certainly would be appropriate here.

Petrobras' attempt to cite authority that ATDI as the beneficiary of the Letter of Credit is not entitled to rely on contractual waiver provisions is quite feeble. It cites four different personal injury cases that do not even deal with attachments. They deal with jurisdiction. Petrobras waived any and all jurisdictional defenses it might have had under the FSIA in open court. (See Appendix B.) Its use of personal injury jurisdictional cases is at best a weak attempt to cloud the issues. ATDI helped arrange and establish the Credit Agreement that created its Letter of Credit. Without one there could not be the other. The entire record in this case supports this conclusion. None of the evidence is to the contrary. For Petrobras to now claim these are separate transactions and that they are not related is beyond belief.

The only reason the Credit Agreement existed was because ATDI as an American supplier enabled Petrobras to obtain Eximbank financing. The purpose of the waiver was to protect the United States suppliers. For Petrobras to claim otherwise is contrary not only to the obvious intent, but also to the express language of the Credit Agreement. Consequently, the Court below was correct in holding Petrobras had waived its immunity as a foreign sovereign.

III.

THE PETITION IS MERITLESS, OR ALTERNATIVELY MOOT, BECAUSE THE DISTRICT COURT HAS STRUCK THE PLEADINGS OF PETROBRAS WHICH RAISE THE ISSUE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

One of the most troublesome problems involved in an interlocutory appeal and one of the reasons this Court has exercised certiorari jurisdiction in interlocutory cases sparingly is the lack of a full record. As Justice Brennan has written "we have made mistakes in granting appeals at an interlocutory state of a case when allowing the case to proceed might produce a result that makes it unnecessary to address an important and difficult constitutional question . . . ." Brennan, "Some Thoughts

On The Supreme Court Workload," 66 Judicature 230 (1983).

Justice Brennan's "thoughts" are certainly appropriate to this appeal. Subsequent to the filing of the appeal, the District Court struck all of Petrobras' defenses concerning the FSIA. (See Appendix B.) Since Petrobras can no longer rely on that defense, the issue it attempts to raise before this Court is meritless, or at least moot. The District Court held because of Petrobras' dilatory conduct and failure to follow Court orders that:

> the defenses of sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602-1611 (1982) [which includes §1609 that prohibits prejudgment attachment] . . . shall be established in favor of the plaintiff [ATDI] as permitted by Rule 37(b)(2) of the Federal Rules of Civil Procedure. (Emphasis added.)

The Court further ordered:

> that Petrobras' defenses pertaining to the Sovereign Immunity Act . . . are established in favor of Atwood Turnkey Drilling, Inc. in this action.

Petrobras did not appeal these findings and, in fact, signed a stipulation that specifically left the Rule 37 sanctions intact. (See Appendix C). This stipulation has been filed with the Court and under the Southern District of Texas local rule 2(G) is effective as an agreement between the parties.

Petrobras' sole argument is based upon 28 U.S.C. 1609, a defense which has been held in ATDI's favor by Court order. Any argument it might have had under the FSIA (which ATDI has shown is contrary to the express language of the applicable documentation in question) no longer exists. The Petition is meritless and should be denied.

IV

ASSUMING ARGUENDO THE ORDER COMPLAINED OF IS AN ATTACHMENT, THIS COURT DOES NOT HAVE JURISDICTION BECAUSE ATTACHMENTS ARE NOT THE PROPER SUBJECT OF AN INTERLOCUTORY APPEAL

Petrobras has brought this appeal claiming that the District Court's order is, in effect, an attachment. Assuming *arguendo* that the order is an attachment, the Fifth Circuit had no jurisdiction to hear the matter. If the Court of Appeals has no jurisdiction to hear the matter,

then this Court is without jurisdiction to grant a petition for writ of certiorari. 28 U.S.C. 1254 requires that a case be properly "in" the Court of Appeals in order for this Court to review a petition for certiorari.

The basic requirement for review is that the jurisdiction of the Court of Appeals must have been properly invoked under the general statutory provisions for reviewing a district court order. 17 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4036 (1977) (hereinafter "Wright"); 16 Wright at § 4004. Petrobras claimed that the appellate court obtained jurisdiction by virtue of 28 U.S.C. 1292(a)(1). That statute, however, confers jurisdiction only as to interlocutory appeals from certain injunctive orders. The Fifth Circuit finding that the order was an injunction, held it had jurisdiction. An attachment is not an injunction. 16 Wright, at § 3922. Therefore, if, the order is an attachment as Petrobras argues, no interlocutory appeal lies. The general rule is that attachments and orders confirming same are not appealable by an interlocutory appeal. *Constructora Subacuatica Diavaz S.A. v. M/V*

Hiryu, 718 F.2d 690, 692 (5th Cir. 1983) and *Astarte Shipping Company v. Allied Steel & Export Service*, 767 F.2d 86, 88 (5th Cir. 1985). See also, 16 Wright at § 3922; 11 Wright at § 2936; *Lowell Fruit Co. v. Alexander's Market, Inc.*, 842 F.2d 567, 569 (1st Cir. 1988); *United States v. Hansen*, 795 F.2d 35 (7th Cir. 1986); *Rosenfeldt v. Comprehensive Accounting Serv. Corp.*, 514 F.2d 607, 609 (7th Cir. 1975); and 28 U.S.C. 1291.

In *House v. Mayo*, 324 U.S. 42, 65 S. Ct. 517, 89 L.Ed. 739 (1945), this Court held that a petition for certiorari could not be granted under section 240(a) of the judicial code (predecessor to section 1254) due to a procedural defect. The case was not properly "in" the Court of Appeals. In the opinion, the Court stated "our authority under that section [240(a)] extends only to cases 'in a circuit Court of Appeals' .... Here the case was never 'in' the Court of Appeals." Id. at 44. See also, *Ferguson v. District of Columbia*, 270 U.S. 633, 657, 46 S. Ct. 355, 70 L.Ed. 771 (1926); and *Good Shot v. United States*, 179 U.S. 87, 21 S. Ct. 33, 45 L. Ed. 101 (1900). This line of reasoning has been cited authoritatively as recently as

1981. In *Davis v. Jacobs*, 454 U.S. 911, 102 S. Ct. 417, 70 L. Ed. 2d. 226, 227 (1981), Justice Stevens writing for the Court stated: "The Court has consistently followed *House v. Mayo* for over 35 years." Id. at 913. See also, *Hicks v. District of Columbia*, 383 U.S. 252, 86 S. Ct. 798, 15 L. Ed. 2d 744 (1966).

Therefore, if this Court finds the order about which Petitioner complains to be an attachment, then the Court of Appeals did not have interlocutory jurisdiction to review the subject matter of the appeal. If this appeal was never properly "in" the Court of Appeals, this Court does not have jurisdiction under 28 U.S.C. 1254 as claimed by Petitioner. As such this Court must either deny the Petition or remand this case to the Court of Appeals with instructions to dismiss the appeal. *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U.S. 10, 18, 51 S. Ct.. 8, 75 L. Ed. 135 (1930).

CONCLUSION

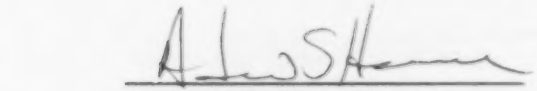
This case for a variety of reasons is not the proper subject matter for an interlocutory writ of certiorari. The District Court's injunction order was a correct one. An injunction does not violate the dictates of 28 U.S.C. 1609; that statute applies only to attachments. No property of Petrobras is arrested, attached or executed upon by virtue of the order. Furthermore, even if the order constituted an attachment, Petitioner waived any right to claim the defense of sovereign immunity. Additionally, should this Court accept Petitioner's argument that the District Court's order is an attachment, then this Court does not have jurisdiction to grant a writ of certiorari.

Finally, this Court should note that the entire appeal is meritless. The District Court has struck all claims and defenses that Petitioner has under the Foreign Sovereign Immunities Act. That being the case Petrobras cannot longer claim it has any protection under 28 U.S.C. 1609. Petrobras' entire basis for appeal no longer exists.

Each of these reasons standing alone would be sufficient cause for this Court to deny the petition. When all of the reasons are added together, the inescapable

conclusion is that the Court of Appeals was correct in its judgment and that the Petition for Writ for Certiorari should be denied.

Respectfully submitted,



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PROOF OF SERVICE

I, Andrew S. Hanen, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Petition for a Writ of Certiorari on the Petitioner and all other interested attorneys by enclosing three copies in an envelope by certified mail, return receipt requested addressed to:

Paul S. Aufrichtig
300 East 42nd Street
New York, New York 10017
Attorney for Petitioner and
for Internor Trade, Inc.

and

Bruce Feichtinger
Bracewell and Patterson
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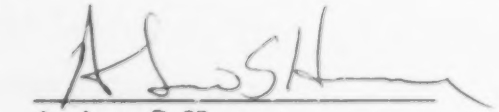
Pennzoil Place
Houston, Texas 77002

Attorneys for Defendant,
International Underwater
Contractors, Inc.

and depositing same in the United States mail at Houston, Texas on this the 15th day of January, 1990.



Andrew S. Hanen

APPENDIX A
EXCERPTS OF CREDIT AGREEMENT ESTABLISHED BY PETROBRAS TO PAY UNITED STATES SUPPLIERS

(commencing at page 1)

WHEREAS, the Borrower has requested the Bank to establish a credit (the "Bank Credit") and Eximbank to establish a credit (the "Eximbank Credit"); the Bank Credit and the Eximbank Credit being sometimes called, individually, a "Credit" and collectively, the "Credits") in its favor in the amounts set forth in Article I so that the Borrower may finance 85% of the costs incurred by the Borrower (the "U.S. Costs"), after July 11, 1985 for the acquisition in the United States and transfer to Brazil of services, equipment and material of United States origin as are approved by Eximbank as eligible for financing under this Agreement (the "Items") required for drilling services in the Campos Basin (the "Project");

WHEREAS, the Borrower will make cash payments for the purchase of the Items in an aggregate amount equal to not less than 15% of the U.S. Costs (the "Cash Payments");

WHEREAS, Banco Central do Brasil has given its approval to the Borrower to negotiate the indebtedness hereunder;

WHEREAS, Eximbank is prepared to issue its guarantee of the Bank Credit;

WHEREAS, the establishment of the Bank Credit and the Eximbank Credit will facilitate exports and imports and the exchange of commodities between the United States and Brazil; and

(commencing at page 19)

ARTICLE V

UTILIZATION PROCEDURES

When all applicable conditions precedent have been complied with, and subject to the other provisions of this Agreement, including Annex B, which is a part hereof, the Borrower may utilize the Bank Credit and the Eximbank Credit in the following two ways:

(1) The Borrower may request a disbursement from the Lenders to reimburse the Borrower for the financed portion of payments made by it to the U.S. suppliers of the Items; and

(2) The Borrower may arrange for letters of credit to be issued or confirmed by the Bank (the Bank in this capacity called the "L/C Bank") in favor of the U.S. suppliers of the Items.

(commencing at page 26)

B. *Waiver of Sovereign Immunity.* The Borrower acknowledges and agrees that the activities contemplated by the provisions of this Agreement and the Notes are commercial in nature rather than governmental or public and therefore acknowledges and agrees that it is not entitled to any right of immunity on the grounds of sovereignty or otherwise with respect to such activities or in any legal action or proceeding arising out of or relating to this Agreement or the Notes. The Borrower, in respect of itself and its properties and revenues, expressly and irrevocably waives any such right or immunity (including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise) or claim thereto which may now or hereafter exist, and agrees not to assert any such right or

claim in any such action or proceeding, whether in the United States or otherwise.

APPENDIX B
ORDER OF JUDGE HITTNER
SIGNED MAY 29, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIME LTDA.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO.
PETROLEO BRASILEIRO, S.A., INTERNOR TRADE, INC. AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.,	§	H-87-1488
Defendants.	§	

ORDER

Pending before this Court is the Objection of Petroleo Brasileiro, S.A. ("Petrobras") to Magistrate's Order Dated August 23, 1988 (Document #103). Judge Lake initially reviewed Magistrate Brown's order. Judge Lake subsequently vacated his September 19, 1988, Order (Document #109) adopting the Magistrate's findings. Judge Lake has also since recused himself. It therefore

falls upon this Court to review Magistrate Brown's rulings on Plaintiffs' motions for sanctions.

RULE 11 AND 28 U.S.C. § 1927 SANCTIONS

Nondispositive pretrial orders of a magistrate are reviewable under a clearly erroneous or contrary to law standard. 28 U.S.C. § 636(b)(1)(A) (1982); Fed. R. Civ. P. 72(a). An order granting monetary sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure is considered nondispositive. *Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 952 (D. Del. 1987). Thus, Magistrate Brown's order imposing monetary sanctions for violations of Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 is a nondispositive order. Accordingly, this Court will apply the "clearly erroneous" standard of review in its review of those sanctions.

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc), and its progeny guide the imposition of sanctions pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 in the Fifth Circuit. *Thomas* requires that a court impose sanctions once a violation of Rule 11 is found. Id. at 876. The Court, however, is vested with "considerable discretion in

determining the 'appropriate' sanction to impose." Id. at 877. *Thomas* also does not require courts to make specific findings in all cases, id. at 883, although "the degree and extent to which a specific explanation must be contained in the record will vary accordingly with the particular circumstances of the case .... If the sanctions imposed are substantial in amount ... review of such awards will be inherently more rigorous" and "such sanctions must be quantifiable with some precision." Id. at 833.[1]

Additionally, before sanctions in the form of reimbursed expenses may be imposed, Fifth Circuit jurisprudence requires that to be reimbursable, the expenses must have been caused by the violation; they must be reasonable, *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 130 (5th Cir. 1988); and the party seeking reimbursement must have exercised his "'duty to mitigate those expenses, by correlating his response, in hours and funds expended, to the merit of the claims.'" *Willy v.*

---

1. These observations apply equally to sanctions imposed pursuant to 28 U.S.C. §1927. *Smith Internat'l, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1197 (5th Cir. 1988).

Coastal Corp., 855 F.2d 1160, 1172 (5th Cir. 1988) (quoting *Thomas*, 836 F.2d at 879).

Reviewing Magistrate Brown's order subject to the foregoing guidelines, this Court finds such order erroneous with respect to its imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The order fails to set forth with any specificity the factual basis supporting an imposition of sanctions, as *Thomas* indicates are necessary given the severity of the sanctions.

Additionally, the information concerning the accrual of attorney's fees is derived solely from affidavits appended to Plaintiffs' Motion for Sanctions. Given the sizable amount of attorney's fees allegedly incurred and, as such, the greater degree of scrutiny expected of this Court, the Court finds that the affidavits fail to provide detail sufficient for this Court or the magistrate to assess the correlation between the stated expenses and fees and any violation of Rule 11. See *Foval*, 841 F.2d at 130. The Court also notes that even if the fees are attributable solely to the violations, actual expenses and fees are not automatically deemed reasonable. *Willy*, 855 F.2d at 1172.

RULE 37

Courts review dispositive orders or recommendations of a magistrate de novo. 28 U.S.C. § 363(b)(1)(B) 1982); see *Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 594 F. Supp. 583, 585 (D. Me. 1984). Courts generally view orders providing sanctions for abuse of discovery under Rule 37 of the Federal Rules of Civil Procedure as nondispositive, see 12 C. Wright & A. Miller, Federal Practice and Procedure § 3076.5 (Supp. 1988). When such orders, however, impose sanctions which can significantly affect the nature of the litigation, courts will deem the motions dispositive, see id., and will conduct a de novo review.

In addition to ordering sanctions pursuant to Rule 11 and section 1927, Magistrate Brown also recommends that as a sanction under Federal Rule of Civil Procedure 37(b)(2)(A) for additional discovery abuses, Defendant's defenses pertaining to the Sovereign Immunities Act, improper service, personal jurisdiction, and forum non conveniens be established in favor of the Plaintiff. Defendant, however, claims to have waived all affirmative defenses, except the forum selection clause defense, prior

to Magistrate Brown's order, thus mooting her recommendations. Nonetheless, this Court will review the magistrate's recommendations. Moreover, because a recommendation that affirmative defenses be established for the Plaintiff may so seriously influence the nature, cause, and quality of an action as to be dispositive, the Court will conduct such review de novo.

The record reflects that Defendant's dilatory conduct compelled Magistrate Brown to enter three separate orders, on March 17, 1988 (Document #43), April 6, 1988 (Document #50), and May 16, 1988 (Document #71), directing Defendant to comply with Plaintiff's discovery requests. Nonetheless, despite the magistrate's efforts to resolve the recurrent discovery disputes, Defendant persisted in its objections. Accordingly, based upon a review of the record, this Court concurs with and adopts the magistrate's findings concerning Defendant's failure to cooperate in discovery.

Additionally, this Court concludes that in the event Defendant decides to reassert the defenses of sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982), and forum non

conveniens,[2] such defenses shall be established in favor of Plaintiff, as permitted by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

In accordance with the foregoing, the Court hereby ORDERS:

(1) that Magistrate Brown's order imposing monetary sanctions be vacated and the case remanded. Given the severity of the sanctions, this Circuit requires a court to make specific findings concerning the conduct violative of Rule 11, based on evidence of specific billing costs and fees sufficient to enable the Court to determine that the costs and fees sought were both reasonable and actually incurred in connection with the alleged violation;

(2) that to facilitate the magistrate's issuance of specific findings pertaining to the above, Plaintiff shall produce to the magistrate, for an in camera review, a more detailed schedule of the costs and fees

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2. The defenses of lack of personal jurisdiction of Plaintiff and improper service may never be asserted once waived. Fed. R. Civ. P. 12(h)(1). Therefore, if Defendant Petrobras has in fact formally waived any objections to lack of personal jurisdiction and improper service, there is no need for the Court to find them in favor of Plaintiff.

incurred by Andrews & Kurth and Peter Curran in connection with the Rule 11 violation asserted; and

(3) that Petrobras' defenses pertaining to the Sovereign Immunity Act, improper service of process, lack of personal jurisdiction, and forum non conveniens are established in favor of Atwood Turnkey Drilling, Inc., in this action.

SIGNED at Houston, Texas, on this 29 day of May, 1989.

/S/
DAVID HITTNER
United States District Judge

APPENDIX C
STIPULATION BETWEEN THE PARTIES
FILED OF RECORD JULY 12, 1989

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ATWOOD TURNKEY DRILLING, INC. AND ATWOOD DO BRASIL SERVICOS DE ASSISTENCIA MARITIME LTDA.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO.
PETROLEO BRASILEIRO, S.A., INTERNOR TRADE, INC., AND INTERNATIONAL UNDERWATER CONTRACTORS, INC.,	§	H-87-1488
Defendants.	§	

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for Plaintiffs and Defendants, Petroleo Brasilerio S.A. ("Petrobras") and Internor Trade, Inc., as follows:

1. Concurrent with the execution of this stipulation by counsel for Plaintiffs, Petrobras will pay to Plaintiffs US$31,000.00 to settle the amount of monetary

sanctions that was to be determined by Magistrate Brown under the May 29, 1989 Order. The parties agree that the portions pertaining to Rule 37 of Judge Hittner's May 29, 1989 Order are not affected by this stipulation.

2. Plaintiffs herewith withdraw with prejudice the following:

A. Plaintiffs' Motion to Strike Petrobras' Pleading and For Sanctions dated April 28, 1989; and,

B. Plaintiffs' Response to Cross-Motion For Sanctions and Supplemental Response by Petroleo Brasilerio dated June 7, 1989.

3. Petrobras and Internor Trade, Inc., respectively, withdraw with prejudice:

A. Petrobras' Motion to Strike Plaintiffs' Supplemental Reply to Petrobras' Amended Motion to Dismiss dated May 12, 1989;

B. Petrobras' Reply to Atwood's Motion and Cross-Motion For Sanctions dated May 18, 1989, and Petrobras' Supplemental Responses and Cross-Motion dated May 26, 1989; and,

C. Internor's Motion to Dismiss and Motion For Sanctions dated May 12, 1987 (reserving, however, that section of the application seeking dismissal of the complaint against it).

/S/	/S/
Attorney for Plaintiffs,	Attorney for Defendants,
Atwood Turnkey Drilling, Inc.	Petrobras & Internor
and Atwood Do Brasil Servicos	Trade, Inc.
De Assistenola Maritima Ltda.	PAUL S. AUFRICHTIG
ANDREW S. HANEN	